

## LEGAL PROFESSIONAL PRIVILEGE IN EU COMPETITION INVESTIGATIONS AFTER THE AKZO JUDGMENT – PRACTICAL THOUGHTS FOR CONSIDERATION<sup>1</sup>

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### I. Introduction

On 17 September 2007, the European Court of First Instance (“CFI”), the second-highest court in the European Union (“EU”), issued its much-anticipated judgment in the *Akzo Nobel* case<sup>2</sup> concerning the scope and application of legal professional privilege (“LPP”) in the context of EU competition law investigations. ACC filed as an intervener in the case on behalf of the in-house legal community since this case threatens the ability of clients to assert LPP when using in-house counsel; the CFI did not adopt our positions, nor the positions of the other interveners making similar arguments. A webpage offering links to ACC’s analysis of the case, the court documents and holdings, and a variety of interpretive and background resources is online for ACC members at INSERT URL. ACC will be working on behalf of its members and the in-house community at large to appeal this decision.

The CFI addressed the following key issues:

- **Personal scope of LPP** – the CFI held that LPP does not cover communications between in-house lawyers and other employees at a company, even where the lawyer is a member of a bar in an EU Member State.
- **Subject-matter scope of LPP** – the CFI extended LPP to cover preparatory documents drawn up exclusively for the purpose of seeking legal advice from outside counsel in exercise of the rights of the defence, even where such documents are not physically sent to the outside counsel, but instead are the basis for telephone discussions.
- **Dispute resolution procedure** – the CFI held that the Commission is not entitled to take a “cursory look” at a document to determine whether the document is privileged. In cases where there is a dispute concerning whether a document is privileged, the Commission must allow the company to seek judicial review before it may read the document.

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<sup>2</sup> Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd and Akrcos Chemicals Ltd v Commission*.

## II. Immediate Impact of the Judgment

### A. Limited to EU Competition Law Matters

While the CFI's holding that in-house lawyers are not eligible for the protections afforded by LPP is disappointing, it is important to remember that this ruling only applies to competition investigations by the European Commission. Therefore, the rules applicable to LPP have not changed with respect to investigations by national competition authorities or other national and local regulators or with respect to private actions brought under the competition law. More generally, the CFI's ruling does not affect the scope of LPP outside of the field of competition law.

### B. Personal Scope of LPP

The *Akzo Nobel* case presented the CFI with an opportunity to extend LPP to include in-house lawyers, or at least create a clear standard for determining when an in-house lawyer is sufficiently independent for LPP to apply. The CFI did not take up this opportunity. Instead, it decided to follow the ECJ's black-line prohibition set out in *AM&S* against extending LPP to in-house counsel. As a consequence, for the purposes of EC competition law investigations, communications between a company's employees and its in-house lawyers are not protected by LPP.

As regards the CFI's ruling on in-house counsel, as disappointing as that ruling is, it is important to bear in mind that the CFI simply confirmed the existing rule. Thus, in-house counsel will not have to amend their practices, but will need to continue to be vigilant to ensure that competition advice on sensitive issues originates with outside counsel so that the advice will benefit from LPP. It also means that companies with in-house counsel in a variety of non-EU jurisdictions who may not be familiar with this doctrine, should train in-house counsel outside the EU as to the manner in which privilege may or may not attach to advice they're providing that is subject to discovery in the EU in a competition law matter.

This does not necessarily mean that it would make sense to go to outside counsel every time that a competition issue arises during the course of a company's operations. In-house counsel can well deal with routine issues concerning matters such as distribution agreements or pricing practices. However, if an issue arises that could subject the company to significant exposure under the competition rules, such as the discovery that a manager has been involved in inappropriate discussions with competitors, it would seem worthwhile to bring in outside counsel to ensure that the documents generated during the investigation of the problem are covered by LPP.

The CFI declined to address the issue of whether communications with lawyers who do not belong to an EU bar are covered by LPP. While CFI's reasoning on LPP for in-house could suggest that communications with such outside lawyers are not *per se* excluded from LPP, prudent companies should operate under the rule that these communications are not covered by LPP. Thus, companies should ensure that advice on EU competition

matters – particularly on the kinds of matters that could result in significant exposure for the company under the competition rules – comes from lawyers who are admitted to an EU bar. For example, if a U.S.-based company discovers that managers in one of its divisions are involved in a global price-fixing cartel and hires a U.S. law firm to investigate the matter, it should ensure that EU counsel are involved in the investigation as communications with its U.S. counsel will not benefit from LPP. Otherwise, records of the investigations, including interviews with managers, would be subject to seizure in the event of a dawn raid by the European Commission.

### **C. Subject-Matter Scope of LPP**

Companies will need to adjust their internal procedures to ensure that they can take advantage of the CFI's holding that LPP applies to documents that were prepared exclusively for the purpose of seeking legal advice from external counsel. In particular, companies should ensure that any such preparatory document be appropriately labeled and include such information as the reason for the production of the document and the name/firm of the outside counsel to be consulted. Where possible, such documents should be filed with the records of the conversation with the outside counsel, as this will facilitate the ability of the company to prove to the Commission's investigating team that the document is in fact covered by LPP.

With the increase in companies' financial exposure under the EU competition rules in recent years, many companies have decided to conduct competition audits of their European operations. Such audits can range from working with managers to identify issues that commonly arise in the context of their businesses that may raise competition concerns to having a team of outside lawyers review internal documents and emails to spot potential competition compliance issues. In-house counsel should ensure that outside counsel are involved in any such audit and that any documents produced in the context of such audits are appropriately labeled as being produced exclusively for the purpose of consulting outside counsel.

### **D. Dispute Resolution Procedure**

The CFI's ruling on the procedure for resolving disputes over the application of LPP will generally not impact a company's day-to-day operations. Instead, it will only be important in the case of an investigation by the Commission, as it allows a company to refuse disclosure of a document. In-house counsel and managers who will likely be involved in dealing with any investigations by competition authorities should be briefed on how this procedure works so that they will not give into attempts by the Commission investigators to have a quick cursory look at a document believed to be privileged. It should be made clear that they should not claim privilege as a delaying tactic because the company can be penalized for abusing the right to involve LPP. More specifically, if the Commission finds that a claim of LPP was made frivolously or in an attempt to delay the investigation, it may increase the level of fines imposed in the event that it eventually finds that the company infringed the competition rules.

### III. Potential Further Action

The CFI's refusal to extend LPP to communications with in-house counsel is very disappointing, as it perpetuates the unjustified discrimination against in-house counsel and fails to recognize the important role played by in-house counsel. While there are practical solutions to deal with the consequences of the judgment articulated in this memo, the fact remains that the judgment will make the work of in-house counsel more difficult and raise compliance costs for companies with exposure to EU competition law.

Contrary to what the Commission suggested in its pleadings before the CFI, extending LPP to in-house counsel also would not have limited the Commission's investigative powers in any material way. It is highly unlikely that the result of a Commission investigation, for example in a cartel case, depends on communication with in-house counsel, in particular as most investigations today are initiated following a leniency application by one cartel member who normally already provides the Commission with the necessary evidence. On the other hand, protecting the ability of in-house counsel to provide confidential legal advice would further the Commission's overall goal of compliance with EU competition law.

These and many other arguments for extending LPP to in-house counsel were put before the CFI, not only by the applicant AKZO, but also by the various lawyers' organisations that intervened in support of AKZO, including ACC. The CFI rejected all of these arguments, and it therefore does not appear promising to plead the issue again before the CFI. However, there are alternative avenues that might be considered to advance the issue of LPP for in-house counsel in EU competition law investigations.

***Appeal to the European Court of Justice.*** The applicants or any of the interveners can lodge an appeal against the CFI's judgment before the ECJ. Such appeal must be brought within two months and ten days of the notification of the judgment. The chances of success are difficult to predict. However, the ECJ is normally less progressive than the CFI and it therefore seems unlikely that it will reverse the CFI's judgment. ACC will nonetheless pursue an appeal as an intervener in the case, and will look to partner with other interveners and Akzo, as appropriate, in that effort.

***EU Legislative Action.*** Even if the ECJ upholds the CFI's decision, it may nevertheless be possible to change the laws regarding LPP through legislative action at the EU level. A major practical hurdle to any legislative change is that the Commission is the EU institution charged with initiating legislation. As the Commission views LPP as a limitation of its investigative powers, it is unlikely that it would voluntarily undertake such an action.

It may be possible, however, for the European Parliament to pressure the Commission into introducing legislation on LPP. In 2003, the European Parliament proposed amendments to the draft EC Merger Regulation establishing legal privilege for in-house lawyers where that lawyer was subject to adequate rules of professional ethics and discipline. While these amendments were not included in the final version of the Regulation that was eventually adopted, it may nevertheless be possible in the future to extend LPP indirectly through the European Parliament.

It may also be possible to have the Council of Ministers pressure the Commission to introduce legislation on LPP. However, given the varying levels of LPP granted under the laws of the Member States, it is unclear whether it would be possible to obtain the necessary majority. Nevertheless, to the extent reforms of LPP can be achieved at the Member State level, it may be possible to obtain action by the Council of Ministers.

***National Legislative Action.*** ACC will look for opportunities to argue for the extension of LPP to in-house counsel in national investigations, in particular by national competition law authorities. One of the reasons that the CFI says it declined to extend LPP to cover in-house counsel was that there was no clear consensus on the issue at the national level. Thus, if the laws of the Member States continue to evolve in a way that provides greater protection to in-house counsel, this evolution may influence future cases in front of the CFI involving LPP. It would also provide support for legislative action at EU level.